In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 429

ALFRED B. CENEDELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15-24) is reported at 224 F. 2d 778.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1955. A petition for rehearing was denied on August 31, 1955. (Pet. 2.) The petition for certiorari was filed on September 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether evidence indicating that petitioner had taken certain fees from the Coccavelli estate under a claim of right constituted an inadmissible collateral attack upon the decree of the probate court allowing the administrator's final account.

2. Whether the trial court should have instructed the jury that receipts from embezzlement do not constitute taxable income.

3. Whether the trial court improperly hurried the verdict by inquiring in open court, after the jury had deliberated eleven hours, whether there was prospect of an early verdict and whether the jury desired additional instructions.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On January 14, 1954, an indictment in four counts was returned against petitioner in the United States District Court for the District of Massachusetts charging him with wilful attempted evasion of his income tax and that of his wife for

each of the years 1947 to 1950, inclusive, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 1, 5-7) The following deficiencies were alleged in the indictment (R. 5-7):[1]

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1947	$6,373.26	$1,137.20	$17,879.20	$5,357.62
1948	5,581.57	737.86	11,008.37	1,852.16
1949	7,369.23	1,083.96	20,861.83	4,505.22
1950	8,086.87	1,273.96	13,025.27	2,401.86

After a jury trial petitioner was found guilty as charged. (R. 462.) On February 21, 1955, he was sentenced to imprisonment for a period of four months on each count, the terms of imprisonment to run concurrently, and to pay a fine of $500 on each count, the fines to be cumulative. (R. 475-476.) The Court of Appeals affirmed. (Pet. 15-24.)

The evidence to support the verdict may be summarized as follows:

Petitioner has practiced law in the town of Milford, Massachusetts, since 1910. He has been active in civic affairs throughout his professional life. He served on the local school committee for over 20 years. He was town solicitor for Milford for five years and for the adjoining town of Mendon for about 25 years. He served on the Massachusetts Industrial Accident Board from 1930 until 1935. Thereafter he was first assistant to the district attorney of Worcester County until 1946 in which year he was elected district attorney. He served as district attorney of Worcester County until 1954. (R. 337-338.)

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[1] Petitioner and his wife filed joint returns for the years involved.

Petitioner did not keep an accurate and complete record of his income from his law practice. His records consisted principally of diaries in which he recorded certain fees, bank statements, deposit slips, cancelled checks and check book stubs. (R. 423.) Petitioner's checking account was used for both business and personal transactions, and he commingled his own funds in the account with those of his clients. (R. 342-343, 428-429.) He admitted at the trial that many items of income were not recorded in his diaries or reported in his tax returns, and that his net income as reported for each of the years involved was understated in a substantial amount. (R. 417-421, 575-590.) Certain items representing unreported income in each year were agreed upon in a series of stipulations between counsel. (R. 16, 253.) Certain other items, which the Government alleged represented unreported income from fees, were disputed in whole or in part by petitioner (R. 575-590), and the Government undertook to prove the disputed items by documentary evidence and the testimony of witnesses. One of the disputed items concerned cash and stock which petitioner received in 1947 from the Estate of Vincenzo Coccavelli.

Petitioner was appointed guardian of Vincenzo Coccavelli, an insane person, in 1920 (R. 62) and served in that capacity until Coccavelli's death. Coccavelli died intestate on August 20, 1946, survived by four heirs who resided in Italy. The heirs appointed petitioner their attorney in fact. On October 10, 1946, petitioner's son, then a law student, was appointed administrator of the estate.

(R. 78.) Petitioner acted as attorney for the administrator (R. 400) and handled all of the transactions involving the estate (R. 402). A separate checking account for the estate was opened in the name of A. B. Cenedella, Jr., Administrator, on January 16, 1947. (R. 106.) The assets of the estate, consisting of cash and securities, had a value of approximately $35,000. (R. 136, 559.)

At various times during 1947, petitioner admittedly received stock and cash of the Coccavelli estate, of a value of over $9,000, which he did not remit to the heirs. Stock of the Home National Bank of Milford was transferred to petitioner, at his direction, by the administrator. (R. 106, 407.) The stock was included in the inventory of the estate at a value of $1,610. (R. 353, 465.) On the date of the transfer, it had a value of approximately $2,300. (R. 325.) Petitioner also acquired the proceeds of various checks which totaled $7,327. Four checks totaling $2,150 were issued to petitioner by the administrator and were deposited by petitioner in his bank account. (R. 403-407.) A check in the amount of $1,500 payable to petitioner as guardian and drawn against a Coccavelli guardianship bank account was deposited in petitioner's account by his secretary. (R. 404.) A check in the amount of $3,177, which was made payable to petitioner by a brokerage firm, representing the proceeds of the sale of bonds belonging to the estate, was deposited by petitioner in his account. (R. 405.) At petitioner's direction his secretary withdrew $500 from a Coccavelli guard-

ianship bank account and deposited the sum in his account. (R. 81, 407.)

On February 16, 1948, petitioner forwarded to the heirs in Italy, by check drawn on his personal account, the sum of $318.29 as a distribution of the estate. (R. 416, 557.) Petitioner made the following notation on the check stub: "In full Coccavelli Est." (R. 558.) Petitioner admitted at the trial that at the time the check was drawn he thought the sum remitted was in full payment of the amount due the heirs. (R. 416.) He also admitted that he used the cash which he received from the estate for his own purposes. (R. 408.) In addition, petitioner conceded that the estate was "substantially closed" in the year 1948. (Pet. 3.)

The administrator did not file any accounting in the Coccavelli estate, and petitioner did not make any further distribution to the heirs until approximately ten months after the indictment. On November 24, 1954, the administrator filed a first and final account in the probate court of Worcester County. The account was allowed on the day it was filed at the request of the petitioner as attorney in fact for the heirs. (R. 462-463.) Among other things, the account stated a payment to petitioner on July 17, 1947, in the amount of $1,610 (Home National Bank stock), for fees and expenses; a payment to petitioner's son on October 22, 1947, in the amount of $2,000 as the administrator's fee; and a distribution to petitioner for the heirs on February 16, 1948, in the amount of $5,725.26. (R. 465.)

No distribution to petitioner for the heirs of $5,725.26 was in fact made on the date shown in the account. (R. 414.) This sum was part of the estate funds which petitioner acquired in 1947. (R. 403-407, 414.) Petitioner did not actually distribute it to the heirs until December, 1954. (R. 414-415.)

Petitioner contended at the trial that his fee as attorney for the administrator was $1,500 and his expenses $110 (R. 352); that the Home National Bank stock was transferred to him at the inventory value ($1,610) in payment of his fee and expenses (R. 349, 465); that his son's fee as administrator was received by him in repayment of a loan (R. 353); that the balance of the estate funds in his hands, over $5,700, was deposited in his bank account and spent by him through inadvertence and innocent error; and that the mistake was not discovered until after he was indicted (R. 356-357, 405-406, 416-417). He objected to the introduction of any evidence relating to the Coccavelli estate, except the first and final account of the administrator, on two grounds: First, that the amount of his fee and expenses as stated in the account was conclusive in this proceeding and the decree of the probate court allowing the account could not be collaterally attacked; and, secondly, that the Government could not establish that he held funds of the estate (other than his fee and that of his son) under a claim of right because he was at all times under a definite unconditional obligation to repay the money. (R. 63-78.)

At petitioner's request, the trial court held a preliminary hearing on the admissibility of the Coccavelli evidence. At the conclusion of the hearing, the court ruled that the evidence was admissible under the Government's theory that from it the jury could infer that in 1947 petitioner intentionally retained the money, in addition to the stock, as compensation for his services as counsel for the administrator and attorney in fact for the heirs. (R. 63-78.)

The jury received the case and retired to consider its verdict at about 10:00 A. M. At 9:00 P. M., the same day, the court recalled the jury to the courtroom whereupon, in the presence of petitioner and counsel for both sides, the following colloquy ensued (R. 460):

> The Court: Mr. Foreman, I take it that there is no prospect of your agreeing within the next five or 10 minutes?
>
> The Foreman: Well, I wouldn't qualify it as to five or 10 minutes, your Honor.
>
> The Court: I thought that, at least counsel and I thought—I suggested it and they agreed that possibly I might say a few general words to you, and then I will ask you whether there is some specific thing you would like to be told about.
>
> One hundred and five years ago there was a very famous Judge here in Massachusetts who found himself in the position we find ourselves in this evening, where a jury had been out a long time and couldn't agree, and he said

quite a lot to the jury, which has been sort of a bible in this situation, and it happens; it is not unique. I'm not going to read all of it but I will read some because it is phrased much better than I ever could phrase it.

The court then read to the jury an excerpt approved by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Tuey,* 8 Cushing 1 (R. 460-461), at the conclusion of which the following took place (R. 461-462):

Now, Mr. Foreman, if there is anything in my charge that you would like to have repeated, if there is any subject on which you would like further illumination from the charge or if there is any evidence you would like to hear, I will hand you a pad and you may address any questions to me that you wish, being not just the decision of one of you as to the questions but you should confer briefly among yourselves so that you agree as to what it is that I am being asked.

The Foreman: Right here, your Honor?

The Court: Yes, you may. If you prefer to go upstairs and do it, you may do that.

The Foreman: I don't think that will be necessary, your Honor.

[Conference between jurors.]

The Foreman: I feel, your Honor, that we are reasonably close to a decision, a verdict.

The Court: That is fine. That was why I brought you down, to find out whether you

were or were not. We will await you, and naturally you may take as long as you feel you should. If you do change your mind and want any questions answered, why, we will be here.

The Foreman: Thank you.

The jury retired for further deliberations at 9:03 P. M. It returned to the court room at 9:20 P. M. with a verdict of guilty on all counts of the indictment. (R. 462.)

ARGUMENT

1. Petitioner's argument that the decree of the probate court of Worcester County, entered in 1954, is conclusive here as to the amount of fees which petitioner claimed in 1947 in connection with the Coccavelli matter, and that it was prejudicial error for the trial court to admit evidence at variance with the facts set forth therein, is without merit.

The trial court, after a preliminary hearing, ruled that the Coccavelli evidence was admissible under the Goverment's theory that from it the jury could infer that *in 1947* petitioner consciously retained the Coccavelli estate money *in payment for services rendered* as counsel for the administrator and as attorney in fact for the heirs. (R. 63-78.) The issue thus raised was whether in 1947 petitioner retained the Coccavelli money under a claim of right and with no restrictions as to its use. If so, and there was ample evidence to support such a finding, it was taxable income to petitioner in 1947. *North American Oil* v. *Burnet*, 286 U. S. 417; *United States* v. *Lewis*, 340 U. S. 590. As was

pointed out by the court below (Pet. 20), the decree of the probate court does not adjudicate or attempt to adjudicate the issue of federal law involved herein.[2]

It should be noted also that the evidence as to the Coccavelli estate related to only a part of the unreported income for the year 1947,[3] and that the evidence as to the counts covering the years 1948, 1949 and 1950 is unchallenged.

2. Petitioner also contends, with respect to the Coccavelli matter, that the failure of the trial court to instruct the jury on the proposition declared by this Court in *Commissioner* v. *Wilcox*, 327 U. S. 404, was prejudicial error. This contention is likewise without merit. Petitioner not only failed to request the court to instruct the jury on the rule of the *Wilcox* case (R. 440-447), but he earnestly requested the court *not* to give any instructions based thereon (R. 473). He may not now complain that he was prejudiced by the omission. Rule 30, *supra*, p. 3.

Furthermore, it is clear from the record that the rule of the *Wilcox* case is not applicable here. As stated above, the Government took the position that petitioner retained the Coccavelli funds under

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[2] Furthermore, it is obvious that if petitioner retained all or part of the money as compensation for his services as attorney in fact for the heirs the amount so retained would not be reflected in the accounting filed in the probate court. That court had no jurisdiction over petitioner's fee as attorney in fact for the heirs.

[3] Petitioner's net income as reported for 1947 was $6,373.26 (R. 19); he admitted at the trial that his correct net income was $8,680.95. (R. 575-576.)

a "claim of right", whereas petitioner contended throughout the trial (and on appeal) that the funds were retained by him through inadvertence and mistake. At no time did the Government inject the element of embezzlement into the case, and petitioner's assertions to the contrary (Pet. 10) are without support in the record. Moreover, the instructions of the trial court on the Coccavelli evidence (R. 453-454) were in complete harmony with the respective positions of the parties as stated at the trial.

3. Finally, petitioner contends that when the jury was recalled to the court room after deliberating eleven hours, the court's remarks, although proper on the "surface" (Pet. 11), had the effect of exerting pressure upon the jury to return a verdict in haste. The record of the proceedings attendant upon the recall of the jury (R. 460-462) clearly demonstrates the lack of substance in this contention.

The court in recalling the jury scrupulously adhered to its obligation to exercise extreme care and caution in order to preserve petitioner's rights. It did not inquire, either expressly or by implication, as to the posture of the jury. Compare *Burton* v. *United States,* 196 U. S. 283, and *Brasfield* v. *United States,* 272 U. S. 448, which are relied upon by petitioner. On the assumption that the jury was not then on the verge of a verdict, the court read to the jury (R. 460-461) an abstract from *Commonwealth* v. *Tuey,* 8 Cushing 1, which was approved by the Supreme Judicial Court of Massachusetts and by this Court. *Allen* v. *United*

States, 164 U. S. 492. It then inquired if the jury desired any further instructions. The court concluded its remarks by reminding the jury that "naturally you may take as long as you feel you should." (R. 461-462.)

Petitioner, himself an attorney, and his counsel were present when the jury was recalled and they registered no objection to the proceedings at that time. Nor were the proceedings now complained of designated as a ground in petitioner's motion for a new trial. (R. 467-468.) It is apparent that the claim of coercion is an afterthought. See *Allis* v. *United States,* 155 U. S. 117.

CONCLUSION

The decision of the court below is clearly correct. The petition for a writ of certiorari presents no question warranting further review and should be denied.

Respectfully submitted,

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OCTOBER, 1955.

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